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IN THE

Supreme Court of the United States

October Term, 1968

No. 651

PETER AANDAHL CHRISTOFFERSON, PAUL HOWARD DAVIS, CHRISTOPHER JOHN HAWKINS, JOYCE EDNA CHAKOS and PETER MICHAEL CHAKOS,
Petitioners,

v.

THE STATE OF WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF OF RESPONDENT IN OPPOSITION

CHARLES O. CARROLL
King County Prosecuting Attorney
JAMES E. KENNEDY
Chief Civil Deputy
JERRY BRIAN RIESS
Deputy Prosecuting Attorney
Attorneys for Respondent

Office and Post Office Address:
W554 King County Courthouse
Seattle, Washington 98104

METROPOLITAN PRESS SEATTLE, WASH.

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CITATION TO OPINION BELOW

The opinion of the Washington State Supreme Court is reported in 74 W.D.2d 156 (1968), a copy of which is set forth as appendix A to the petition.

The opinion of the Washington State Supreme Court appealed from herein incorporates by reference the opinion in *The State of Washington v. Irving James Walcott*, 72 W.D.2d 947 (1968), a copy of which is attached to the petition as appendix B.

JURISDICTION

The jurisdictional requirements are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Do the fourth and fourteenth amendments to the United States Constitution require that a contemporaneous record be made as to proceedings attendant to issuance of a search warrant by a Justice of the Peace where said warrant is issued upon probable cause supported by oath or affirmation and all parties to said issuance proceedings are subject to full examination on sworn testimony as to its issuance?

2. Was there sufficient probable cause shown as regards each petitioner for the issuance of the search warrants as required by the fourth and fourteenth amendments to the United States Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The applicable statutes and constitutional provisions are adequately set forth in the petition.

STATEMENT

About 10:00 a.m. of November 5, 1965, Detective Allan L. Fawcett of the Seattle Police Department Narcotics Detail received a telephone call from an anonymous informant, asking if he desired specific information concerning narcotics in the University District of Seattle (R-Chakos 171). The informant stated that her boy friend was involved in the LSD and marijuana situation and she wanted to help the police eliminate the problem.

Detective Fawcett told the female informant that he desired to have the information but that it would be necessary for her to possibly go to court. She agreed to this and suggested a meeting place at the Cowan Park Bridge area of Seattle. Later the same day, Detective Fawcett met with the informant, a Larissa Hrishko (R-Chakos 172), and after a brief conversation she agreed to come down to police headquarters to talk further (R-Chakos 173). Detective Robert W. Waitt joined them on the way to the police department. At about 2:30, Detectives Fawcett, Waitt and Sprinkle interviewed the informant for thirty to forty-five minutes in the Narcotics Department (R-Chakos 174). She told the detectives that she had just arrived in Seattle on November 4th and had visited six places since her arrival here; she herself had seen drugs and knew that there was marijuana, LSD and so forth kept (R-Chakos 174). She didn't know the exact addresses but following the conversation, she directed Detective Fawcett in his car to each of five houses and at each house described to him the type of narcotic and whether she had seen it the day before or that very morning (R-Chakos 177). She described each individual premises as to the entry way and the general layout of rooms with the exception of the Al Moss house (R-Chakos 179).

Upon return to the police department, the detectives and informant proceeded to the King County Prosecutor's office and talked to assistant chief deputy prosecutor Thomas Stang. The informant was introduced to Mr. Stang and he conducted an interview of her in the presence of both Detectives Fawcett and Waitt. The informant told the prosecutor that she wanted to help

because her boy friend had gotten involved in this and she wanted to stop the narcotics in the University District (R-Chakos 149). Mr. Stang directly asked her if she had been at each of the five addresses and what she had seen. The question arose due to his amazement or curiosity at her having visited at least five different addresses in less than two days (R-Chakos 150). In response, the informant related the same information she had given the detectives earlier. This was that she had been in Mexico when a large quantity of marijuana had been purchased by the residents of one of these houses. That she came back to Seattle with this individual and that they had stopped off at Berkeley on the way to trade or purchase 600 capsules of LSD (R-Chakos 151). That she had arrived in Seattle on November 4th and had been to the five addresses visiting friends and observing drugs and marijuana being used at each place within the past 36 hours (R-Chakos 151).

The detectives told Mr. Stang that this information coincided with information that they had uncovered in their recent investigation of University area narcotics use and that the informant had pointed out the houses she had visited so as to ascertain correct addresses and verify the information with other police department sources.

Complaints were then prepared for search warrants and at approximately 5:00 o'clock in the afternoon of the same day, King County Deputy Prosecuting Attorney Thomas A. Stang filed the five complaints for search warrants in the Seattle District Justice Court of magistrate Evangeline Starr. Seattle police detectives R. W. Waitt and A. L. Fawcett were present at this time along

with the informant. The written complaints for search warrants were presented to Judge Starr and Detective R. W. Waitt who was to sign them was put under oath (Appendix D R-Chakos 22:13, 36:12). Detective Fawcett was also sworn during these proceedings and gave testimony. These requests for search warrants were each considered separately in *seratum* (R-Chakos 25:8, 40:12). It is apparent from the record that the informant referred to in each complaint was the girl who was present and identified only as the informant. She was asked whether she was the informant and whether what she told the officers in relation to each of the complaints was true (D, R-Chakos 25:10; App. D). She replied that it was. Judge Starr learned that the information given by the informant had been very recently supplied (D, R-Chakos 24:19) and that prior to receiving this information the Seattle Police Department had been investigating these very same addresses for suspected narcotics violations (D, R-Chakos 24:13). The police officers did not disclose the informant's name to Judge Starr, and the State did not elect to have her testify under oath. The informant was not previously known to the officers and they had had no past experience with her. However, the officers testified under oath as to their testing of the reliability of her statements concerning the information furnished. The court questioned the informant as to the truth of statements she made and the officers and she affirmed the statements. The information obtained from the informant by the officers and related to Judge Starr was as follows: that the informant was present when marijuana was purchased in Mexico (D, R-Chakos 34) and from there had proceeded to Berkeley,

California, where 600 capsules of LSD were purchased (D, R-Chakos 48:13). That the informant then came to Seattle (D, R-Chakos 28, 34) and the bulk of the marijuana was currently in a suitcase at 5514-½ 11th Avenue N.E., Seattle (App. D); that on the 4th day of November, 1965 the informant had been in the upstairs apartment, 102 Broadway East, and had seen people known by the informant to use narcotics and had seen them smoking marijuana in the apartment on that date; that the informant had been at 3818 Fourth Avenue N.E. on the 5th day of November, 1965 and had seen marijuana and LSD there at that time (D, R-Chakos 28); that she had been at 4243 11th Avenue N.E. on the 4th day of November, 1965 and had also seen marijuana there at that time (App. D); that she had seen marijuana at 4243 11th Avenue N.E. at various other times, and had been told that the occupant there, Paul Davis, is selling marijuana (D, R-Chakos 30); that she was at the residence at 2303 N.E. 65th on November 4, 1965 and while there saw both marijuana and LSD; finally, that she was at 5514-½ 11th Avenue on November 5th and had seen marijuana while there (D, R-Chakos 34).

In addition, Officers Waitt and Fawcett testified under oath before Judge Starr as to facts that they had obtained through independent investigations prior to receiving information from the current informant; as to 120 Broadway East, it is not specified; as to 3818 Fourth Avenue N.E., Judge Starr was advised that:

> one of the residents at this address was Peter Christofferson who has previously been arrested on suspicion of a narcotics offense involving marijuana, although not charged; that officers had observed

> suspected narcotics users in the past month entering and leaving the premises (App. D)

and that the surveillance was made by or at the request of Detective Waitt or Fawcett (D, R-Chakos 38:3, 38:12; 77:18, 77:8, 78:23); as to 4213 11th Avenue N.E., Judge Starr was advised by detectives that

> the house was occupied by Paul Davis; that the detectives had received information from other reliable informants that Paul Davis was trafficking in narcotic and dangerous drugs; that Paul Davis drove a Meteor Hearse and was using the hearse to carry narcotics; (App. D)

that the address had been verified by Detective Fawcett (D, R-Chakos 74-76, 35-36); as to the address at 2303 N.E. 65th, Judge Starr was advised by the detectives that:

> this was the residence of Al Moss who had been suspected to be trafficking in dangerous drugs and narcotic drugs; that this information was obtained by reliable informants; that the house had been observed on previous occasions and that suspected users of narcotics had been seen entering and leaving the premises (App. D).

This statement is confirmed by the testimony (D, R-Chakos 30:21, 30:30, 31:7, 31:14; C., 66 to 71); as to 5514-½ 11th Avenue N.E., Judge Starr was advised by the detectives

> that this was the residence of Irving Walcott, a partner in the Figerwand Coffee House in the University District congregate; that Walcott and the Eigerwand had been suspected as a source of marijuana and dangerous drugs in the District since March of 1965, when it came to the attention of the Seattle Police Department from informants that both were involved; (App. D).

This statement is confirmed by the testimony (D, R-Chakos 38-51, 86, 87).

Judge Starr, in discussing the testimony which was given orally at the time the search warrants were requested, stated several times that a great deal of testimony was taken (D, R-Chakos 33:22, 35:22, 40:24). The estimated time taken by Judge Starr in considering these requests vary from not less than 15 minutes to a maximum of 45 minutes (D, R-Chakos 36:22, 39:13, 79:13, 90:30).

Judge Starr was satisfied that the written complaints, considered together with the oral sworn testimony, gave her probable cause to believe that marijuana was located at the addresses specified in the requests and she issued the search warrants (D, R-Chakos 34:17).

In view of the fact that no written record was made of the hearing before the magistrate, affidavits of magistrate Starr, Deputy Prosecuting Attorney Stang and detectives Waitt and Fawcett were later obtained. These affidavits relate what occurred at the hearing on probable cause for issuance of the search warrants and are attached as Appendix D to the petition. They were considered on the motion to suppress evidence. A special hearing was then ordered by the trial judge in order to provide persons arrested in the aftermath of the searches an opportunity to examine the magistrate, the deputy prosecuting attorney and the detectives as to the contents of the affidavits and the proceedings before the magistrate. At this special hearing, the magistrate and the two detectives were examined and this testimony was transcribed. On February 3, 1966, based upon the affidavits and the transcript of the special hearing, the de-

fendant's motion to suppress the evidence was denied.

All appellants were arrested on November 5, 1965 at a total of three different locations in Seattle and convictions were obtained in each instance, based on evidence seized pursuant to the five search warrants.

REASONS FOR DENYING THE WRIT AS TO QUESTION ONE

I. Contemporaneous Record In Justice Court

A. No Substantial Question Is Raised

Petitioner complains in effect of the failure of Seattle District Justice Court magistrate Evangeline Starr's not transcribing the proceedings surrounding issuance of a search warrant. The complaint fails to note that the search warrant was issued after sworn testimony under oath by two police officers and confirmation by an informant present at the proceedings that narcotics did in fact remain in the possession of numerous individuals at the addresses visited that morning and preceding day by the informant. The testimony indicated where the narcotics were obtained, how they were transported to the place in question, and for what purposes they were being maintained. Further, the testimony indicated confirmation of the informant's disclosures by independent investigation by the officers present before magistrate Starr. The conclusion is inescapable that the five search warrants were issued upon probable cause supported by oath or affirmation as required by the fourth and fourteenth amendments to the United States Constitution.

That the proceeding before Judge Starr was not transcribed contemporaneously does not in any fashion in-

trude upon its validity in supporting the issued search warrants. The constitutional and legislative requirement is that said warrants issue upon probable cause supported by oath or affirmation. The record is clear that such standard was met.

In order to afford petitioners every opportunity to test the constitutionality of the proceedings and evaluate whether or not probable cause existed, the Superior Court required affidavits as to those underlying proceedings. Once the affidavits were presented demonstrating that probable cause was shown for issuance of the search warrants, the Superior Court judge denied petitioners' motion to suppress the evidence seized but preserved an opportunity for renewal of said motion upon completion of a Superior Court hearing as to the prior justice court proceeding, thereby affording petitioners an opportunity to examine Judge Starr, officers Waitt and Fawcett of the Seattle Police Department, and deputy prosecuting attorney Thomas Stang. Following invoking of the hearing opportunity, petitioners renewed their motion to suppress, and the Superior Court once again found the search warrants were issued upon probable cause supported by oath or affirmation, pursuant to statutory and constitutional requirements.

An additional hearing was held just prior to the trial at which the informant Larissa Hrishko, then married to defendant-petitioner Hrishko, testified. The court again denied the motion to suppress.

The evidence having overwhelmingly demonstrated that magistrate Starr properly issued the search warrants, and petitioners having been generously afforded sworn

affidavits as to the proceedings, testimony under oath and with full cross-examination extended as to those proceedings, as well as interrogation during trial as to those proceedings, no substantial question arises of importance to other litigants concerning whether or not the Seattle District Justice Court proceedings had to be contemporaneously transcribed.

B. There Is No Conflict In Decisions Needing Clarification

There are no reported cases that have come to the attention of respondent holding other than that a search warrant must be issued only upon a showing of probable cause based upon or supported by oath or affirmation. Since this is the foundation inquiry of petitioners' sought writ, and, since the principle is well established beyond controversy that the constitutional and statutory requirement is probable cause supported by oath or affirmation, there is no true question needing response or clarification, present a showing that probable cause was established before magistrate Starr.

C. A Full Disclosure of the Justice Court Proceedings Has Been Afforded Petitioner In Re Search Warrant Hearing

Even if it be required to fully disclose what occurred at the proceedings in justice court preliminary to issuance of the search warrants, this in effect has already been done through the affidavits and Superior Court hearings. The same effect has been attained as would be accomplished by a contemporaneous record with the additional safeguard being afforded petitioners of allowing cross-examination of all parties present during those

proceedings as to what occurred. Therefore, nothing would be gained by review as to a contemporaneous record being required in justice court search warrant proceedings.

D. Procedure Below Was Fully in Accord with Constitutional Principles and Statutory Requirements

The fourth and fourteenth amendments are clear and concise on their requirements that searches be based upon warrants issued as the result of probable cause being shown to a committing magistrate, based upon oath or affirmation. Not all judicial proceedings are amenable to full transcription and this would be especially true wherein informants are presented in person before a magistrate.

REASONS FOR DENYING THE WRIT AS TO QUESTION TWO

II. Probable Cause Was Shown for Issuance of the Search Warrants

A. The evidence given before Magistrate Starr included in general:

(1) Presence of the informant who affirmed the information related by the detectives;

(2) Sworn testimony by the detectives that the assertion by the informant coincided with information they had from other informants who were known to be reliable;

(3) Sworn testimony by the detectives that the information coincided with their own investigation and surveillances;

(4) A narrative under oath to the effect that the informant was present in Mexico when the narcotics were purchased; informant traveled to Berkeley where additional drugs were acquired (600 LSD

capsules); informant accompanied the party with the drugs and narcotics to Seattle, arriving November 4th; and informant had seen drugs and/or narcotics in each of the five addresses the day before or morning of the hearing.

B. The evidence given before Magistrate Starr included specifically:

In re 5514-½ 11th Avenue N.E., Seattle;

The informant had seen the bulk of the marijuana purchases in Mexico still in a suitcase at that address this morning;

That the detectives knew this as the address where many suspected drug users congregate and had been suspected as the source of drugs since March, 1965.

In re 102 Broadway East

informant had seen people smoking marijuana on this date in the house and that its occupants were known users;

In re 3818 4th Avenue N.E.

informant had been in the house this date and seen marijuana and LSD at that time; that the detectives knew one of the residents was Peter Christofferson who has previously been arrested on suspicion of a narcotics offense involving marijuana, and that officers had observed suspected users frequenting the place for the last month.

In re 4243 11th Avenue N.E.

informant had seen marijuana there on the day before and at various other times and that informant knew Paul Davis, the occupant, as a vendor of marijuana;

the detectives testified further that the house was occupied by Paul Davis whom other reliable in-

formants stated was trafficking in narcotics and dangerous drugs, using a Meteor hearse to carry the narcotics;

In re 2303 N.E. 65th

that informant visited the residence the day before and saw both LSD and marijuana there; The detectives testified that this was the residence of Al Moss, who had been suspected of trafficking in dangerous drugs and narcotics and was so identified to the detectives by reliable informants;

that the house had been visited by suspected users of narcotics as ascertained by surveillance.

The hearing before Judge Starr lasted from 15 to 45 minutes and concluded with issuance of the five search warrants after Magistrate Starr was satisfied that the written complaints coupled with the sworn oral testimony gave her probable cause to believe that narcotics and/or dangerous drugs were located at the addresses specified.

All five defendant petitioners were arrested as a result of these search warrants. The search warrants were obviously issued upon well-founded probable cause.

A signed affidavit for a search warrant is not required. The fourth amendment to the United States Constitution requires only that warrants issue upon probable cause supported by oath or affirmation.

Petitioner argues that, while courts have generally permitted the issuance of search warrants on the basis of hearsay statements of undisclosed informants, this violates the fourth amendment of the United States Constitution, and that the requirement of oath or affirmation is not fulfilled by hearsay only, and cites *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 Sup. Ct. 1509 (1964).

Aguilar does not contain such a sweeping indictment of the use of hearsay and is distinguishable from the instant case.

In *Aguilar*, the affidavit for search warrant stated: "Affiants have received reliable information from a credible person and do believe that heroin . . . are being kept at the above-described premises. . . ." The facts which the informant had stated to the officer were not set forth in the affidavit. The following language from *Aguilar* is significant, page 113:

> Here the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause."

Search warrants issued on the basis of information received from an unidentified informant were upheld in *Rugendorf v. United States*, 376 U.S. 528, 11 L.Ed.2d 887, 84 S.Ct. 825 (1964); in *Jones v. United States*, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960).

United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); the court summarizes in part as follows:

> If the teachings of the court's cases are to be followed and the constitutional policy served, af-

> fidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude by reviewing courts toward warrants would tend to discourage police officers from submitting their evidence to a judicial officer before acting. 380 U.S. at 108.

Chief Justice Crockett and Justice Ellett of the Utah Supreme Court adequately summarized the probable cause upon sworn oath or affirmation rule in dissenting opinions in *State v. Jasso,* Utah Supreme Court, 3 Cr.L.-2103 (1968). The majority opinion is not opposite in that Utah statute requires specifically that the search warrant issue only upon written deposition or affidavit; however, the remarks of Judge Ellett and Justice Crockett are directly in point as to the 4th and 14th amendments and the general law as well as Washington state law on search warrants. The dissentors stated in part as follows:

> The main opinion cites no cases and I know of none which holds that a search warrant issued upon oath but not reduced to writing is unconstitutional. The law is to the contrary as is shown by the following recent cases:
>
> *State v. Malbeck,* 419 P.2d 805 (Wash. 1966), at p. 807:
>
> A signed affidavit for a search warrant is not required. The fourth amendment to the United States Constitution requires only that warrants issue upon probable cause supported by oath or affirmation. RCW 10.79.010 requires only that the application for a search warrant be under oath and that the justice find reasonable cause for the officer's belief.

State v. Walcott, 435 P.2d 994 (Wash. 1967), at p. 999:

The defendant contends, however, that the fourth amendment to the United States Constitution requires that the complaint or affidavits must show probable cause on their face before a search warrant may issue. The defendant concedes that the law of this state requires only an oath or affirmation to support a finding of probable cause. *State v. Malbeck*, 69 Wn.2d 695, 419 P.2d 805 (1966). He argues, however, that the state should follow the federal rule which requires that sworn statements in support of an application for a search warrant be reduced to writing.

Although the federal practice, which results in making and preserving a contemporaneous record of the proceedings before the magistrate, may be preferable; however, it is not a constitutional requirement under the fourth amendment. We adhere to our ruling in *Malbeck* and the cases cited therein.

Scott v. State, 231 A.2d 728 (Md. 1967), involved the question of whether search warrants issued by the magistrate upon affidavits not sworn to before the notary public were valid. The court said at page 731 of the Atlantic Reporter:

The record affirmatively shows that in both instances the applicant was sworn by the judge who issued the warrant. This is sufficient, whatever the notary may have done. *Tucker v. State*, 244 Md. 488, 497, 224 A.2d 111.

The federal rule is set forth in *United States v. Myers*, 270 F.Supp. 734, 737-38 (E.D.Pa. 1967) as follows:

The information does not, on its face, contain sufficient factual information to support a finding by the judicial officer that there was probable cause for the issuance of the warrant. Conclusory allegations such as those contained in Sgt. Michaels' Information are insufficient (Citations omitted), but

the fact that the information itself is not sufficiently detailed to support a finding of probable cause under fourth amendment standards does not terminate the inquiry into the validity of the warrant. The required factual support may be furnished by other means. The fourth amendment requires only that probable cause be 'supported by Oath or Affirmation,' it does not require that the support be in writing. Oral testimony as well as affidavit in writing, may serve as the basis for the issuance of warrant under constitutional standards.

* * *

It is thus obvious that no constitutional rights of the defendant have been abridged.

As to the statutory provision requiring the deposition to be in writing and subscribed by the deponent, I think it is not mandatory that the subscription be affixed before the warrant may issue. A failure to sign before the issuance of the warrant is but a technicality and may be corrected by signing the affidavit thereafter without in any way prejudicing the constitutional rights of the defendant, when the written deposition actually sets out the substance of the oral testimony given to the magistrate. This view is supported by the text material in 47 Am. Jur. *Search and Seizure* Sec. 26, which states: 'A search warrant is usually required to be issued upon a written affidavit, although the better, but not the unanimous, view seems to be that the absence of a supporting affidavit or complaint does not render the warrant void. * * *

Under the circumstances of this case I do not think a criminal in possession of a narcotic drug can complain of a loss of his constitutional right in order to escape the penalty of the law merely because there was a delay in reducing the oral testimony to writing. Not only was there probable cause to induce the magistrate to believe that there was marijuana in the residence of the defendant, there actually was a great quantity in that residence.

"It is high time that courts stop being so overzealous of the rights of criminals and begin to be cognizant of the rights of the long-suffering, decent citizenry of this country." — Ellett, J.

Dissent: I am in accord with what Justice Ellett says and with his conclusion about substantial compliance with the statute in obtaining the search warrant. However, in my view, the far more important consideration in this case is that the denial of the motion to suppress the vital evidence is justified on the broader foundation that it was lawfully obtained even if there had been no search warrant. The fact that effort was also made to obtain a warrant, even if there were some defect in the procedure, should not be deemed to impair the validity of the evidence otherwise lawfully obtained. * * *

The possession of narcotic drugs (marijuana) is a continuing felony. Because it can be quickly and easily hidden or disposed of, there is special justification for considering that peremptory action is not an 'unreasonable' search. The law is that when a police officer has good reason to believe a felony is being committed, he has not only the right but the duty to enter where it is being committed to interrupt its continuance, arrest the perpetrator and take possession of any material evidence bearing on the crime, just as was done here. It is clear that Officer Adair in fact had good reason to believe that a felony was being committed. Upon the basis of the information he had, he said so under oath. His additional effort to obtain a search warrant, when none was necessary, did not destroy his right to enter.

* * *

Under the circumstances here disclosed I do not believe it is shown that the search was 'unreasonable.' On the basis of what I have said above, I think the motion to suppress the evidence was properly denied, irrespective of any irregularity that may have existed in connection with the issuance of the search warrant. I would affirm the conviction. — Crockett, C. J.

Although petitioners repeatedly infer in their brief that the search warrants were issued and later the underlying affidavits supplied, the situation was considerably different and in line with recognized procedures and safeguards. *The search warrants issued after probable cause was fully established by sworn complaints coupled with oral testimony under oath.* The later affidavits merely reconstructed what had been presented to Magistrate Starr at the hearing. In *United States v. Myers,* 270 F. Supp. 734 (1967), a similar procedure of sworn testimony was approved.

> The information does not, on its face, contain sufficient factual information to support a finding by the judicial officer that there was probable cause for the issuance of the warrant. Conclusory allegations such as those contained in Sgt. Michaels' Information are insufficient [See *Aguilar v. State of Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *United States ex rel. Campbell v. Rundle,* 327 F.2d 153 (3rd Cir. 1964); *United States ex rel. De Negris v. Menser,* 247 F. Supp. 826 (D. Conn. 1965), and cases cited therein, aff'd, 360 F.2d 199 (2d Cir. 1966)], but the fact that the information itself is not sufficiently detailed to support a finding of probable cause under fourth amendment standards does not terminate the inquiry into the validity of the warrant. The required factual support may be furnished by other means. The fourth amendment requires only that probable cause be "supported by Oath or Affirmation," it does not require that the support be in writing. Oral testimony as well as affidavit in writing, may serve as the basis for the issuance of a warrant under constitutional standards. *Gillespie v. United States,* 368 F.2d 1 (8th Cir. 1966); *Miller v. Sigler,* 353 F.2d 424 (8th Cir. 1965), cert. denied, 384 U.S. 980, 86 S.Ct. 1879 (1966); *Sparks v. United States,* 90 F.2d 61 (6th Cir. 1937). See and compare Rule 41, Federal Rules of Criminal

Procedure. Pennsylvania permits the use of oral testimony presented to the judicial officer to support the issuance of a warrant, *Commonwealth v. Crawley,* 209 Pa. Super. 70, 223 A.2d 885 (1966), and that procedure satisfies the fourth amendment requirement of reasonableness, *Ker v. State of California,* 374 U.S. 23, 83 S.Ct. 1623 10 L.Ed.2d 726 (1963).

The testimony presented to the Justice of the Peace by Sgt. Michaels, considered in conjunction with the conclusory allegations in the Information, furnished ample factual support for a finding of probable cause, 270 F. Supp. 737-738.

In *Scott v. State,* 231 A.2d 726, the Supreme Court of Maryland discussed yet another instance of informant-based probable cause.

The appellant contends that "the basis for the issuance of the warrant must be within the personal knowledge of the applicant and cannot be certified by his oath or information and belief, even if the facts and sources of information on which his belief was based, such as responsible official sources, were stated."

In passing upon this question it is appropriate to point out that both the affidavit and application for the warrants allege violation of Article 27, §264B. Under that section the mere possession of the proscribed article is itself a criminal offense. Probable cause has been clearly and succinctly defined as: "less than certainty or demonstration but more than suspicion or possibility." *Burrell v. State,* 207 Md. 278, 113 A.2d 884.

The United States rule was declared in *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 736, 4 L. Ed.2d 697, 708, as follows:

'*We conclude therefore that hearsay may be the basis for a warrant.* We cannot say that there was so little basis for accepting the hearsay here that the

Commissioner acted improperly. The Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was *substantial basis* for him to conclude that narcotics were probably present in the apartment, *and that is sufficient.* * * * Corroboration through other sources of information *reduced the chances of a reckless or prevaricating tale;* that petitioner was a known user of narcotics made the charge against him much less subject to skepticism than would be such a charge against one without such a history.' (Emphasis supplied.)

The rule derived from *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327, itself not a search warrant case, but declared parallel because it arose under a statute requiring "probable cause" to exist before an arrest could be made.

The rule was discussed at length and fully adhered to in *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684, in which an appeal by the government from a decision adverse to a warrant produced reversal.

The refusal of the Court of Appeals to permit the issuance of a warrant on hearsay from an unknown source as in *Kapler v. State,* 194 Md. 580, 71 A.2d 860, announces no law special or peculiar to Maryland. *Aguilar v. State of Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, is in full accord. But *Ventresca, supra,* 380 U.S. at page 108, 85 S.Ct. at page 745, at page 688 of 13 L.Ed.2d makes it crystal clear that "in *Aguilar* we recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' *so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions.*" [Emphasis supplied]

The true state of the Maryland law appears precisely to parallel the United States rule. It is very significant that Chief Judge Hammond, citing *United States*

v. Ventresca, supra, with approval, chose to quote this passage from that decision in *Henderson v. State,* 243 Md. 342, 347, 221 A.2d 76, 79,

'This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based. See *Aguilar v. State of Texas, supra* [378 U.S. 108 at 114, 84 S.Ct. 1509, 12 L.Ed.2d at 729. Recital of some of the underlying circumstances in the affidavit is essential [*as it is under the Maryland statute*] (the emphasized parenthetical words are Judge Hammond's) if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *Jones v. United States, supra,* 362 U.S. [257] at 270, 80 S.Ct. [725] at 735 [4 L.Ed.2d 697] . . .'

Chief Judge Hammond's parenthetical reference to the Maryland statute equates it with the United States rule authorizing hearsay information from a reliable source to be utilized in the determination of "probable cause" if the issuing court is informed of some underlying circumstances within the personal knowledge of the affiant reasonably justifying belief in the reliability of the information received from a known informant.

The anomaly of a decision granting authority to police to arrest upon reasonably reliable information (as in *Murray v. State,* 236 Md. 375, 378, 203 A.2d

908) while denying authority to police to submit that same information to the scrutiny of a judicial officer in an application for a warrant is as unwarranted an action in Maryland as it has been declared in the Federal Courts.

In *Jones v. United States*, 362 U.S. 257, 270, 80 S.Ct. 725, 735, 4 L.Ed.2d 697, it was said:

> What we have ruled in the case of an officer who acts without a warrant governs our decision here. If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant. If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimize police conduct, and resort to them would ultimately be discouraged.

> The late case of *Tucker v. State*, 244 Md. 488, at page 498, 224 A.2d 111, strongly intimates that hearsay may be utilized by an affiant when its reliability has been established, as does the very recent case of *Gatewood v. State*, 244 Md. 609, wherein the Court of Appeals stated at page 615, 224 A.2d 677 at page 681, that a "general statement received from an unnamed informant, who is only alleged to be 'considered reliable' *without any reason given as the basis for that conclusion*, would not be probable cause for the issuance of a warrant." (Emphasis supplied.) *Scott v. State*, 231 A.2d 732-735.

The instant matter includes not only reliable informant information and knowledge of the officers personally, but is further coupled with another informant who is present before the Magistrate and asserts the truth of her personal knowledge conveyed to the court by the detectives. The informant before the court was further demonstrated

reliable by the agreement of her information with that known previously by the officers.

In arguing for granting of the writ, petitioners suggest the issue has never been resolved of whether or not a transcript must be made of the search warrant proceedings. The case law is not in conflict as petitioners assert. The law is clear that the State must demonstrate that probable cause was given for issuance of the warrant where a challenge arises. It is evident from this case that the challenge was met and beyond all doubt it was demonstrated that probable cause was shown to Judge Starr for issuance of the warrants. The procedure herein adopted surpassed any making of a contemporaneous record because it afforded extensive cross-examination of witnesses. Further, a question arises where an informant is present at the hearing of disclosing his or her identity by requiring a contemporaneous record being made.

Petitioners have further asserted doubts concerning the affidavits given by Detectives Fawcett and Waitt, Judge Starr and prosecutor Stang. The record is clear that the affidavits were only *typed* in the prosecutor's office after inquiry into the recollection of each affiant prior thereto. The inferential suggestion by petitioners that the prosecutor authored the affidavits is patently wrong as demonstrated by the testimony of all affiants in superior court.

CONCLUSION

The conclusion is inescapable that the fourth and fourteenth amendment requirements of issuance of search warrants only upon a finding of probable cause based on affirmation and/or oath was met. Further, it is clear that probable cause was thoroughly established in the hearing before Magistrate Starr. Therefore, the petition for writ of certiorari should in all justice be denied as being without merit.

Respectfully submitted,

CHARLES O. CARROLL
King County Prosecuting Attorney
JAMES E. KENNEDY
Chief Civil Deputy
JERRY BRIAN RIESS
Deputy Prosecuting Attorney
Attorneys for Respondent

